III. Entering Judgment, Stays of Collection, and Obtaining a Judgment Lien

A. What is a Judgment?

Fed. R. Civ. P. 54(a), provides that the term "[j]udgment" is "a decree and any order from which an appeal lies." Fed. R. Civ. P. 58 provides that a judgment "shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." See United States v. Indrelunas, 411 U.S. 216 (1973).

Section 1291, 28 U.S.C., provides that the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States...." The courts have generally construed the term "final decision" as used in § 1291 as being a decision that disposes of all claims of all parties in a lawsuit. See generally 9 James Wm. Moore and Bernard J. Ward, Moore's Federal Practice, ¶¶ 110.06-110.13 (2d ed. 1991); 7B James Wm. Moore, Moore's Federal Practice, § 1291 (2d ed. 1995).

A judicial decision that disposes of fewer than all claims or all parties in a suit is, as a general rule, an interlocutory order and, because it is not a final decision, is not appealable until a final decision is issued. An important exception to this general rule, however, is provided in Fed. R. Civ. P. 54. Rule 54(b) provides that when a decision disposes of one or more but fewer than all of the claims or parties in a lawsuit the court may direct entry of a final judgment only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. Rule 54(b) is important to our work because we not infrequently obtain, in the course of a lawsuit, a favorable decision as to one of several claims or with respect to one of several parties.[4] When this happens, a trial attorney should generally request the court to make the determination specified in Rule 54(b) and direct entry of final judgment. This will allow the Government to proceed without delay to use the steps outlined in this Manual to collect the judgment.

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[4] The most common situation where this arises is trust fund recovery suits where several responsible persons are joined as defendants on the Government's complaint or counterclaim. Often the Government obtains a default judgment or summary judgment against one defendant, but has to proceed to trial before obtaining judgment against others.

The definition of judgment is important because the Government's authority to use judicial collection procedures to collect a debt arises primarily from Fed. R. Civ. P. 69 and 28 U.S.C. § 3001, each of which authorizes judicial collection actions to collect or enforce a "judgment." Thus, without the Rule 54(b) determination, when a decision is entered as to fewer than all claims or parties the Government would have to wait for a Rule 54(a) final decision as to all claims and all parties before it could initiate judicial collection activities.

Accordingly, unless otherwise specified, the term "judgment" as used in this Manual means a final decision that disposes of all claims of all parties in a lawsuit, or a decision that disposes of one or more but fewer than all of the claims or parties and has been expressly determined by the court pursuant to Rule 54(b) to be a final judgment on the ground that there is no just reason for delay.

B. Form of Judgment

When a judgment requiring payment to the Government is entered in any case, whether after litigation, default, or as security for a settlement, it should cover the entire amount to which the United States is entitled. That is, it should cover tax, penalties, and interest that are assessed; interest and penalties accrued from the date(s) of assessment until the date of judgment; and interest and penalties accruing after the date of judgment until payment. It is pointless to litigate with great ferocity or negotiate a favorable settlement, and then give up a substantial portion of the Government's claim because a judgment is drafted unartfully, or a judgment entered as security for a settlement default does not adequately protect us when default occurs.

In drafting a judgment (assuming it is for the full amount of our claim) it is preferable to hew as closely as possible to the amounts of assessed tax, penalty, and interest, and then refer simply to interest and penalties[5] accruing after the date(s) of assessment to the date of payment in accordance with

[5] Some penalties accrue periodically until reaching a specified maximum. See, e.g., I.R.C. § 6651. Frequently the amount of these penalties that is assessed is not the maximum but, rather, the amount that had accrued as of the date of assessment. Nevertheless, like accrued but unassessed interest, the accrued but unassessed penalties that accrue after the date of assessment can and should be included in the judgment.

law.[6] Under 28 U.S.C. § 1961(c)(1), interest on tax judgments is computed at the rate established under § 6621 of the I.R.C., which may be adjusted quarterly.[7] I.R.C. § 6622 provides for the daily compounding of interest, including interest on judgments.

If one or more payments or credits have been made since the date of assessment, interest accrues on the full amount of the original assessment until the date of the first payment, and thereafter accrues on the unpaid assessed balance. The following example illustrates the manner in which interest accrues. Assume:

(1) the original assessment, for 1987 federal income tax in the amount of $20,000 (including any assessed interest and penalties), was made on May 15, 1988;

(2) the taxpayer paid $5,000 on September 12, 1991 (reducing the unpaid assessed balance to $15,000), and an additional $3,000 on January 5, 1995 (further reducing the unpaid assessed balance to $12,000);

(3) a judgment for the unpaid balance is to be entered on June 15, 1996.

The Government is entitled to interest as follows:

(a) on the full $20,000 from the date of assessment (May 15, 1987) until the date of the $5,000 payment (September 12, 1991) which payment reduces the unpaid assessed balance to $15,000;

(b) on the unpaid assessed balance of $15,000 and all interest accrued pursuant to paragraph (a), above, from September 12, 1991, until the date of the $3,000 payment (January 5, 1995) which payment further reduces the unpaid assessed balance from $15,000 to $12,000;

(c) on the unpaid assessed balance of $12,000 and all interest accrued pursuant to paragraphs (a) and (b), above, from January 5, 1990, until payment.

The best method for drafting the judgment (and the underlying complaint) to ensure accuracy and completeness is to

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[6] Judgments entered after litigation should also provide for the award of costs. See pp. 13-14, infra.

[7] Because the rate of interest is subject to change, the rate should not be specified in the judgment.

set forth the date(s) and amount(s) of all assessment(s) and payment(s) in the text of the judgment itself (or in a chart in the judgment if more than one tax period or type of tax is involved) and then add the operative language as follows[8]:

> Judgment is entered in favor of the United States and against John Doe for the unpaid assessed balance of 1987 federal income tax and related interest and penalties in the amount of $12,000, [plus all penalties accruing under law after the date of assessment (May 15, 1988)] plus interest accruing after the date of assessment (May 15, 1988) pursuant to 26 U.S.C. §§ 6601, 6621, and 6622, and 28 U.S.C. § 1961(c) until paid.

Note that in the above example the amount actually due on the date of entry of the judgment, June 15, 1996 (including interest accrued to that date), exceeds $39,000, yet the only dollar amount mentioned in the judgment is $12,000. That is why it is essential to be very precise in specifying in the judgment how, and from what date, interest and penalties accrue. If the above judgment merely stated that it was for "$12,000 plus interest according to law" the court and the taxpayer might erroneously assume from that somewhat vague language that interest accrued only from the date of entry of judgment, since that is the general rule in nontax cases pursuant to 28 U.S.C. § 1961(a). Attached as Exhibits 3 and 4 are sample forms of judgment. Attached as Exhibits 5 and 6 are stipulations for entry of judgment requiring payment to the Government pursuant to a settlement.

It is also acceptable to draft a judgment that includes all unassessed interest and penalties that have accrued from the

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[8] Because the correct drafting of a judgment in a tax collection case is complex and somewhat technical, especially with respect to accrued interest and penalties, a trial attorney should generally offer to draft a proposed judgment for the court in cases where the interest computations are complex. Be aware, however, that Fed. R. Civ. P. 58 provides that "[a]ttorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course." See 6A James Wm. Moore, Moore's Federal Practice ¶ 58.02.1[3] at 58-21 (2d ed. 1996); Gold v. United States, 552 F. Supp. 66 (D. Colo. 1982) (in tax refund suit, judge directed that attorneys submit forms of judgment, where the computations necessary for judgment were complex and the attorneys were familiar with the computations.)

date(s) of assessment to the date of entry of judgment (or a date near the date of entry of judgment), and provides for additional interest (and, if applicable, penalties) accruing after the specified date. This can only be done, however, when there is an up-to-date computation of all unassessed but accrued interest (and, if applicable, penalties). Attached as Exhibits 7 and 8 are sample forms of judgment that employ this method.

If a judgment is entered as security against default under a settlement, draft the judgment in the expectation that the worst will happen--the taxpayer will default before making any of the installment or collateral agreement payments called for under the settlement. Accordingly, if settlement is based solely on collectibility, the settlement should provide that the amount of the judgment should be the full amount of our claim, including accrued interest and penalties as set forth above (and not any lesser amount due under the settlement). If settlement is based partially on litigating hazards and partly on collectibility, the amount of the judgment should be at least the maximum amount of our claim that we could sustain in litigation, plus interest and penalties as specified above. Either the judgment itself or our letter to the taxpayer's attorney accepting the offer should state that (1) we will agree not to collect on the judgment for as long as the taxpayer is not in default as to obligations under the settlement, including any collateral agreement and (2) we will supply the taxpayer with a satisfaction of judgment upon the taxpayer's completion of all obligations under the settlement, including any collateral agreement.

We generally should not set out the terms of the settlement in the judgment. If there is a default on the settlement obligations, we want to execute on the judgment, and the terms of settlement are academic. The exchange of correspondence (offer and acceptance letters) which constitutes the settlement agreement is a contract, which protects the taxpayer. The judgment for the full amount of the liability is to protect the Government in case the taxpayer defaults on obligations under the settlement. When the judgment is for the full amount sought from the taxpayer instead of the lesser amount accepted under the settlement, the judgment also serves to give the taxpayer a strong financial incentive to comply with the terms of the settlement.

A judgment securing installment payments (or collateral agreement payments) under a settlement should be entered immediately, and the abstract of judgment filed promptly to create a judgment lien.

C. The Judgment Should Include an Award of Costs

Under 28 U.S.C. § 2412 and Fed. R. Civ. P. 54 the United States is entitled to an award of its costs when it prevails in an action.

Rule 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." The types of costs allowed are listed in 28 U.S.C. § 1920. In most cases the bulk of our costs will consist of court reporters' fees for "stenographic transcript[s] necessarily obtained for use in the case." This generally includes fees for transcripts of depositions that are introduced in evidence (at trial or in support of a motion for summary judgment). In some cases, however, the prevailing party can recover costs of depositions used solely for discovery. See 6 James Wm. Moore, Moore's Federal Practice, ¶ 54.77[4] (2d ed. 1995).

To recover costs, the trial attorney must take three steps: (1) save, and file in the DJ and personal files, copies of court reporters' bills for deposition transcripts; (2) prepare and submit a bill of costs pursuant to Rule 54(d) promptly after the entry of final judgment; and (3) ensure that the losing party actually pays the costs. Costs of the type enumerated in 28 U.S.C. § 1920, upon allowance by the clerk, are included in the judgment. 28 U.S.C. § 1920. Because the costs become part of the judgment, the trial attorney can use the discovery procedures listed in Rule 69 as well as the judgment collection remedies contained in 28 U.S.C. to assist in collecting them.

In cases where the trial attorney obtains a largely uncollectible judgment, it is unlikely that the Government's costs will be collected. In most full payment refund cases (and many other cases), however, the losing party is quite collectible. In some cases the losing party will even pay the costs voluntarily if we just submit the bill of costs and ask for payment.

If fees and costs are awarded to the Government under Rules 11, 16, 26, or 37 during the course of the litigation and have not already been collected, the trial attorney should be sure to include language to that effect in the final judgment for the underlying tax, so that it is clear that the total judgment includes these sanctions.

As an alternative to the Tax Division collecting costs pursuant to judgment collection procedures the IRS can, pursuant to I.R.C. § 6673(b), assess and collect (in the same manner as a tax) sanctions, attorneys' fees, and court costs awarded to the Government in tax cases. To accomplish this the trial attorney should send the IRS the appropriate form and a certified copy of

the judgment. See Exhibit 9 for a copy of the form to be used for this purpose.

D. Ten-Percent Surcharge for Costs of Collection

Section 3011, 28 U.S.C., authorizes the United States to recover a surcharge of "10 percent of the debt" in order "to cover the cost of processing and handling the litigation and enforcement under this chapter of the claim for such debt." The surcharge can be a very effective collection tool, especially against potential judgment debtors who have the means to satisfy a judgment in full. In some cases, simply mentioning the existence of the surcharge in a pre-suit letter may be enough to cause a prospective defendant to pay the underlying debt in full. Of course, if the debtor is unable to pay the underlying debt in full, the surcharge may be of little or no practical benefit. The surcharge is not recoverable if the United States recovers an attorney's fee in connection with enforcement of its claim or if the law governing the claim provides for the recovery of similar costs.

The Department of Justice takes the position that the § 3011 surcharge is recoverable in any affirmative collection suit brought by the United States, including all tax collection suits and counterclaims that result in a money judgment. A number of district courts, however, have held that the surcharge is not applicable unless and until the Government has availed itself of one of the pre- or postjudgment collection tools provided under subchapters B or C of the Federal Debt Collection Procedures Act (28 U.S.C. §§ 3101-3206). [9] See e.g., Rendleman v. Shalala, 864 F. Supp. 1007, 1012-13 (D. Ore. 1994); United States v. Smith, 862 F. Supp. 257, 263-64 (D. Haw. 1994); United States v. Maldonado, 867 F. Supp. 1184, 1199 (S.D.N.Y. 1994); United States v. Mauldin, 805 Supp. 35 (N.D. Ala. 1992). As the Rendleman court pointed out, however, as soon as the Government files its abstract of judgment under 28 U.S.C. § 3201 to obtain a judgment lien, the Government is entitled to the surcharge because the § 3201 judgment lien is a judgment collection tool available under subchapter C of the Federal Debt Collection Procedures Act. Because the Tax Division will promptly file an abstract of

[9] The collection procedures authorized by §§ 3101-3206 are: (1) Prejudgment Attachment (§ 3102); (2) Prejudgment Receivership (§ 3103); (3) Prejudgment Garnishment (§ 3104); (4) Prejudgment Sequestration (§ 3105); (5) Enforcement of Judgment Lien (§ 3201); (6) Postjudgment Execution (§ 3203); (7) Postjudgment Installment Payment Order (§ 3204); and (8) Postjudgment Garnishment (§ 3205).

judgment in all or virtually all cases where it has obtained a judgment, the holdings of cases such as Rendleman and Mauldin may in fact pose only a minor obstacle in the Division's path to obtaining the § 3011 surcharge.

Consistent with the Department's interpretation of § 3011, all complaints and counterclaims brought by the Division seeking money judgments should specify that the United States seeks the § 3011 surcharge as part of its judgment. Similarly, the surcharge should be sought in all summary judgment motions in such affirmative collection cases and should be requested in all other judgments to be entered in favor of the Government in such cases. If a court declines to include the surcharge in the initial judgment, following the reasoning of Mauldin, Rendleman, and similar cases, then the surcharge should be sought again after an abstract of judgment has been filed. This can (and should) be done promptly in a post-judgment motion that establishes that the abstract of judgment has been filed in accordance with 28 U.S.C. § 3201.

When the § 3011 surcharge has been obtained, and after the full amount of the underlying judgment (including all accrued interest and penalties) has been collected, the extra ten percent, to the extent it is collected, should not be paid to the IRS and applied to the delinquent taxpayer's account. Rather, amounts collected towards the ten-percent surcharge should be paid to the Department of Justice in the same manner as is done with attorneys' fees, sanctions, and other such amounts collected by the Department.

The § 3011 surcharge can be a very useful collection tool in many of the Division's cases. Trial attorneys and paralegals need to be aware of how the surcharge provision works and should be mindful of how the surcharge can best be used to assist in collecting delinquent taxes.

E. Stays of Collection

1. Automatic Stay of Collection of a Judgment

Fed. R. Civ. P. 62(a) provides, in pertinent part, that "no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry." [10] Thus, no action may be taken to enforce a money

[10] See generally 7 and 9 Moore's Federal Practice (2d ed. 1996), pertinent to Fed. R. Civ. P. 62 and Fed. R. App. P. 8(a); Charles (continued...)

judgment in favor of the United States by execution or other proceedings for a period of ten days. The ten-day period of the stay commences on the day the judgment is entered as provided in Rule 58. No action is required by the judgment debtor to create the stay, since it is automatic.

2. Motions to Stay Collection of a Judgment

Fed. R. Civ. P. 62(b) provides that if a timely motion is filed under the provisions of Rules 50, 52(b), 59 or 60, the court, in its discretion, may also stay the execution of, or any proceeding to enforce, a judgment pending the disposition of the motion, but the stay is not automatic. [11]

If no stay has been granted by the district court, action to collect the judgment can be taken upon the expiration of the ten-day automatic stay period irrespective of the filing of an appeal. If the judgment is satisfied, the appeal by the judgment debtor may not be rendered moot. See, Cahill v. New York, N.H. & H. R.R., 351 U.S. 183 (1956); In re Latham, 823 F.2d 108 (5th Cir. 1987). Once the automatic ten-day period has expired and proceedings for enforcement have begun, any action taken by the judgment creditor to enforce the judgment will not be invalidated by a subsequent stay as the stay is not retroactive. 7 James Wm. Moore, Moore's Federal Practice, ¶ 62.06 at pp. 62-35 through 62-36 (2d ed. 1996).

3. Posting a Bond as a Condition of a Stay

Upon the expiration of the ten-day period, Rule 62(d) allows a party appealing the entry of a money judgment to prevent enforcement of the judgment by furnishing an appropriate supersedeas bond or other security. [12] The purpose of the

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[10] (...continued)
A. Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure, § 2901 et seq. (1995).

[11] Fed. R. Civ. P. 62(b). Note that a supersedeas bond (see pp. 16-17, infra) may be imposed as a condition of the stay.

[12] The granting of a stay of execution of a judgment, except as provided in Rule 62, may constitute an abuse of discretion.
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supersedeas bond is to preserve the status quo of the parties during appeal, thereby avoiding the risk of restitution if the appeal is successful while, at the same time, protecting the rights of the judgment creditor against any loss resulting from the failure to enforce the judgment during the pendency of an unsuccessful appeal. Poplar Grove Planting and Ref. Co. v. Bache Halsey Stuart, Inc., 600 F.2d 1189 (5th Cir. 1979). Although the approval of a supersedeas bond precludes further proceedings to enforce the judgment, the other legal consequences of the entry of the judgment are not suspended. The bond may be given at or after the time of filing the notice of appeal and the stay is effective upon approval of the supersedeas bond by the court. [13] Any application for approval of a supersedeas bond must ordinarily be addressed first to the district court, and, if unsuccessful, then to the appellate court. [14]

In view of the purpose of the supersedeas bond, the amount of the bond should be the full amount of the judgment together with the estimated costs of the appeal and interest which may accrue during the pendency of the appeal. The amount of the bond and the adequacy of the surety ordinarily will be determined by the district court under Rule 62(d). [15] As the extent of the liability of the surety is determined by the terms and conditions of the bond, care should be exercised to ensure that the bond clearly provides for the payment of the full amount of the judgment, costs on appeal and interest in the event the judgment

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[12] (...continued)
Compare Geddes v. United Fin. Group, 559 F.2d 557 (9th Cir. 1977) with Trans World Airlines, Inc. v. Hughes, 515 F.2d 173 (2d Cir. 1975), cert. denied, 424 U.S. 934 (1976). See also Federal Presc. Serv., Inc. v. American Pharm. Ass'n, 636 F.2d 755 (D.C. Cir. 1980).

[13] See Fed. R. Civ. P. 62(d).

[14] See Fed. R. App. P. 8(a).

[15] See Fed. R. App. P. 8(a).

is affirmed, in whole or in part, or if the appeal is dismissed. [16]

F. Judgment Lien

1. United States District Courts

The entry of judgment alone does not create a judgment lien. A judgment lien comes into existence only when a certified copy of the abstract of judgment is properly filed. 28 U.S.C. § 3201. [17] Accordingly, a trial attorney must take the steps necessary to obtain the judgment lien. An abstract of judgment form, cover letter to the United States Attorney and instructions are attached as Exhibit 10. Unlike a tax lien, which attaches to all of the taxpayer's property, a judgment lien attaches only to real property of the judgment debtor. Section 3201(a) requires the filing to be made in the same manner as a notice of tax lien is filed under I.R.C. § 6323(f)(1) and (2). Thus, a certified copy of the abstract of judgment should be filed in the appropriate location(s) where all real property of the judgment debtor is located. See pp. 31-33, infra, for discussion of the proper place to file a notice of federal tax lien pursuant to I.R.C. § 6323(f)(1) and (2).

For tangible and intangible personal property, a judgment lien can be obtained only by seizing the property under the judgment enforcement procedures.

Creation of a judgment lien in favor of the United States is especially important in those cases in which the underlying liability of the judgment debtor is not secured by a federal tax lien, for example liability under §§ 3505 and 6332(c) of the I.R.C. and liability for erroneous refunds. A judgment lien is effective for 20 years and, with the approval of the court, may be renewed once for an additional 20 years. [18] 28 U.S.C. § 3201(c).

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[16] See Fed. R. Civ. P. 65.1 for the procedure to enforce the liability of the surety on the bond, should such action be required.

[17] Before the enactment of 28 U.S.C. § 3201, in order to obtain a judgment lien it was necessary to register or record the judgment in accordance with state law applicable to state judgments. See 28 U.S.C. § 1962.

[18] Contrast the judgment lien with I.R.C. § 6322, which provides that a federal tax lien is not merged in a judgment and continues until satisfied or rendered unenforceable by reason of lapse of

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2. The Court of Federal Claims

Section 2508, 28 U.S.C., provides specifically for the entry of judgments rendered by the Court of Federal Claims in favor of the United States, and provides that such judgments shall be enforceable in the same manner as judgments entered by a district court.

3. United States Bankruptcy Courts

In most of the Tax Division's litigation in the bankruptcy courts, we do not obtain a money judgment of the sort that can be collected using the judgment collection procedures contained in the Judicial Code (28 U.S.C.). For example, most litigation in bankruptcy court involves disputes as to the amount, relative priority, or dischargeability of our claim. Once these disputes are resolved by an order of the bankruptcy court, our claim is allowed in the manner set forth by the court and we can generally close our file, since responsibility for monitoring collection of the amounts owed by the bankruptcy debtor (and assessing them if they have not yet been assessed) rests with the IRS.

On occasion, however, we may seek and obtain a money judgment in a bankruptcy court. A money judgment entered by a bankruptcy court is a judgment within the meaning of 28 U.S.C. § 3002(8), since the 28 U.S.C. § 3002(2) definition of a "court" includes a bankruptcy court. Accordingly, the collection tools of the Federal Debt Collection Procedures Act (see pp. 41-43, infra) are available to collect such a judgment. Among these collection tools are the creation of a judgment lien under 28 U.S.C. § 3201 by filing a certified copy of the abstract of judgment in the same manner as in the case of a district court judgment, as discussed, supra. These collection remedies cannot be used, however, if the Bankruptcy Code § 362 automatic stay is still in effect, unless the bankruptcy court lifts the stay at our request pursuant to § 362(d).

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[18] (...continued)
time. See United States v. Bank of Celina, 823 F.2d 911 (6th Cir. 1986); United States v. Overman, 424 F.2d 1142 (9th Cir. 1970); United States v. Hodes, 355 F.2d 746, 749 (2d Cir. 1966), cert. granted, 384 U.S. 968 (1966), cert. dismissed, 386 U.S. 901 (1967).